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16 UNITED STATES DISTRICT COURT  
17 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
18 SAN FRANCISCO DIVISION

19 \_\_\_\_\_  
20 MARGUERITE HIKEN and }  
21 THE MILITARY LAW TASK FORCE, }  
22 Plaintiffs, } Case No. CV-06-2812 (MHP)  
23 v. }  
24 DEPARTMENT OF DEFENSE and } Hearing Date: January 28, 2008  
25 UNITED STATES CENTRAL COMMAND } Hearing Time: 2:00 p.m.  
26 Defendants. }  
27 \_\_\_\_\_

28 **DEFENDANTS' MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF THEIR RENEWED  
MOTION FOR SUMMARY JUDGMENT**

## INTRODUCTION

This action concerns plaintiffs' Freedom of Information Act ("FOIA") request to the Department of Defense ("DOD") seeking 1) the rules of engagement in Iraq, and 2) documents concerning the shooting of an Italian journalist and an Italian official as their car approached a checkpoint outside of Baghdad.

6 For a complete statement of material facts, the Court is respectfully referred to  
7 defendants' First Motion for Summary Judgment, and defendants' reply in support of their First  
8 Motion for Summary Judgment. When defendants moved for summary judgment, plaintiffs  
9 cross-moved for summary judgment. The Court denied both defendants' and plaintiffs' motions  
10 for summary pursuant to its Memorandum and Order, dated September 28, 2007 ("Order").

11 Pursuant to the Order, the Court required defendants to supply a supplemental  
12 declaration, describing the search that was conducted for documents and describing the mistaken  
13 posting of 15-6 report on the internet in a format that could be manipulated to reveal classified  
14 information. The Order also required defendants to provide *in camera* review of the documents  
15 in question, and take certain other steps including providing unredacted portions of certain  
16 documents to plaintiffs. Defendants previously complied with the order in all respects except for  
17 filing the supplemental declaration and received an extension until December 14, 2007 to provide  
18 the supplemental declaration. The supplemental declaration is filed herewith.

19 The supplemental declaration of Major General Thomas L. Moore Jr. (“Moore  
20 Declaration” or “Moore Decl.”) describes a new search for documents rather than the original  
21 search. Defendants were unable to comply with the Court’s direction to describe the original  
22 search because of personnel changes since the first search was performed and defendants’  
23 inability to locate a record of the search terms used previously. Consequently, defendants  
24 obtained plaintiffs’ consent, and the Court’s permission, to perform a new search for documents.  
25 This new search resulted in the production of certain appendices to the documents which had not  
26 been located previously. These appendices have been turned over to plaintiffs, and to the Court,  
27 and are described in the Revised Vaughn Declaration. Now that defendants have complied with

1 the September 28, 2007 Order in all respects, defendants respectfully move for renewal of  
 2 defendants' first motion for summary judgment.<sup>1</sup> Defendants could not move for this relief  
 3 previously as the new search described in the Moore Declaration had not yet been completed.

4 **ARGUMENT**

5 **I. SUMMARY JUDGMENT IN FAVOR OF  
 6 DEFENDANTS IS APPROPRIATE,  
 7 PURSUANT TO EXEMPTION 1, AS TO THE  
 FIRST FOUR DOCUMENTS LISTED ON THE  
 REVISED VAUGHN INDEX.**

8 Since defendants have met their burden of showing that the first four documents<sup>2</sup> were  
 9 properly classified under Exemption b(1), the Court should grant summary judgment to  
 10 defendants as to those documents. The Court held that substantial weight must be accorded to  
 11 the defendants' declarations unless controverted by record evidence or evidence of bad faith.  
 12 Order at 10; *Minier v. CIA*, 88 F.3d 796, 800 (9th Cir. 1996). The Court also found "no tangible  
 13 evidence of bad faith" on the part of defendants. Order at 10-11; *Carter v. U.S. Dep't of  
 14 Commerce*, 830 F.2d 388, 393 (D.C. Cir. 1987) (before subjecting the government's affidavit to  
 15 heightened scrutiny, court must have tangible evidence of bad faith).

16 The Court found that plaintiffs have not rebutted defendants' explanation that disclosure  
 17 of the first four documents could damage national security by posing a security risk to troops in  
 18 Iraq. Order at 12-13 (quoting the Ghormley Nov. 3, 2006 Dec. at ¶¶ 8, 11-13). Moreover, the  
 19 Court did not find that this information had been previously disclosed (Order at 14), and held  
 20 further that, even if it had been, there was a sound reason for avoiding further disclosure:  
 21 "avoiding official confirmation or disclosure of classified information is a valid basis for

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23 <sup>1</sup> A separate motion for summary judgment has been briefed but not yet argued before the  
 24 Court concerning five documents referred from the Department of Defense to the State  
 Department. Oral argument on that motion is currently scheduled for January 28, 2008.

25 <sup>2</sup> Summary judgment in favor of defendants is also appropriate as to the 15-6 report (the  
 26 fifth document listed on the Revised Vaughn Index) for the reasons stated in defendants' first  
 27 motion for summary judgment and for the reasons stated at Point II *infra*. Those arguments are  
 28 not repeated here, and the Court is respectfully referred to defendants First Motion for Summary  
 Judgment for the full arguments.

1 invoking Exemption 1.” Order at 13-14; *See Edmonds v. FBI*, 272 F. Supp. 2d 35, 48 (D.D.C.  
 2 2003). Since the Court found that defendants met their burden pursuant to Exemption 1,  
 3 defendants are entitled to summary judgment as to first four documents pertaining to the rules of  
 4 engagement. *Id.* at 14 (“The Court concludes that defendants have met their burden for justifying  
 5 non-disclosure under Exemption 1”). Consequently, summary judgment in favor of defendants  
 6 is appropriate upon the Court’s *in camera* review of these documents. *Id.*

7 **II. DEFENDANTS DID NOT WAIVE THE CLAIMED  
 8 EXEMPTIONS BY MISTAKENLY POSTING THE 15-6  
 9 REPORT ON THE INTERNET IN A FORMAT WHERE  
 THE REDACTIONS COULD BE REMOVED.**

10 Plaintiffs claimed that the mistaken posting of the 15-6 report waived the protection of  
 11 the claimed exemptions. Order at 11. In reviewing this matter, the Court recognized that “[i]t  
 12 seems highly unlikely that the ‘mistaken’ posting of a redacted version of the report meets the  
 13 requirements to overcome the claimed exemptions”. *Id.* Nevertheless, the Court required a  
 14 further explanation concerning this mistaken posting of the 15-6 report on the internet.

15 In order for a government agency to waive the protection of a FOIA exemption, an  
 16 authoritative agency official must officially and intentionally release the information publicly.  
 17 *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999). Furthermore, the party claiming that a  
 18 waiver has occurred bears the burden of demonstrating that the specific information at issue has  
 19 been officially disclosed. *See Afshar v. Dep’t of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983);  
 20 *James Madison Project v. National Archives*, 2002 WL 31296220, \*1 (D.C. Cir. 2002). Here,  
 21 far from meeting plaintiffs’ burden, the evidence indicates that the mistaken posting of the report  
 22 in an insecure format was not an official disclosure and does not overcome the claimed  
 23 exemptions.

24 First, a comparison of the two versions of the report, redacted and unredacted, shows that  
 25 the redactions were intended to protect highly sensitive information pertaining to rules of conduct  
 26 for the armed forces including, but not limited to, tactics for movement and control of traffic, the  
 27 rules of engagement, standard operating procedures, information concerning improvised  
 28 explosive devices, training, communications, and reports of casualties. *See* Moore Decl. ¶ 4(d);

1 Clearly such information falls within the protections of Exemption 1 because the dissemination  
 2 of this information may compromise the security of U.S. troops in Iraq (and thus meets the  
 3 procedural and substantive requirements for classified information as set out in E.O. 12958 as  
 4 amended). Order at 14 (“The court concludes that defendants have met their burden for  
 5 justifying non-disclosure under Exemption 1”).

6 Further, the following evidence indicates that the unauthorized posting of this document  
 7 in this format where classified information could be revealed was completely unintentional.  
 8 First, there was no formal FOIA review permitting this posting in this insecure format, as would  
 9 be required before the official release of such a document. Moore Decl. ¶ 4(a). Second, the  
 10 redactions were “unredacted” or unmasked by an unauthorized third party, and not by the  
 11 government further supporting the government’s contention that this mistaken posting in this  
 12 insecure format was unintentional. Moore Decl. ¶ 4(c). Third, the document was removed from  
 13 the MNF-I web site in less than 15 minutes from the time this error became known,  
 14 demonstrating that defendants did not intend that this information be made public. Moore Decl.  
 15 ¶ 4(b). Fourth, by plaintiffs’ own admission, the information was available on the internet in  
 16 unredacted form only from “unofficial sources.” See Plaintiffs’ Mem. at 14; Moore Decl. ¶ 4(c).  
 17 Fifth, even the employee who posted the report ineffectively did take pains to try to redact the  
 18 classified information, and thought he had done so – again demonstrating defendants’ intent to  
 19 keep this information classified. Moore Decl. ¶ 4(a). All of these factors support defendants’  
 20 explanation that the posting of the report was mistaken and that no one intended to reveal this  
 21 sensitive information.

22 Moreover, as the Court also recognized, official release of the information would result in  
 23 confirmation of the earlier posting and “avoiding official confirmation or disclosure of classified  
 24 information is a valid basis for invoking Exemption 1.” Order at 13; *Fitzgibbon v. CIA*, 911 F.2d  
 25 755,766 (D.C. Cir. 1990) (“[W]e have unequivocally recognized that the fact that information  
 26 resides in the public domain does not eliminate the possibility that further disclosures can cause  
 27 harm to intelligence sources, methods and operations.”). Defendants, therefore, did not

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1 knowingly waive the protections of the claimed statutory exemptions. Hence, summary  
 2 judgment is appropriate as to the 15-6 report.

3 **III. DEFENDANTS PROPERLY CONDUCTED A  
 4 COMPREHENSIVE NEW SEARCH FOR RESPONSIVE  
 DOCUMENTS.**

5 Plaintiffs claimed that defendants' search for responsive documents was inadequate.  
 6 Order at 6-7. To obtain summary judgment on the issue of the adequacy of the records search,  
 7 an agency must "conduct a search reasonably calculated to uncover all relevant documents."  
 8 Citizens Commission on Human Rights v. Federal Drug Administration, 45 F.3d 1325, 1328 (9<sup>th</sup>  
 9 Cir. 1995) (quoting Zemansky v. Environmental Protection Agency, 767 F.2d 569, 571 (9<sup>th</sup> cir.  
 10 1985)). "[A]ffidavits describing agency search procedures are sufficient for purposes of  
 11 summary judgment . . . if they are relatively detailed in their description of the files searched and  
 12 the search procedures, and if they are nonconclusory and not impugned by evidence of bad faith."  
 13 Citizens Comm'n, 45 F.3d at 1328 (quoting Zemansky, 767 F.2d at 571).

14 In determining the sufficiency of a search, "the issue to be resolved is not whether there  
 15 might exist any other documents possibly responsive to the request, but rather whether the *search*  
 16 for those documents was *adequate*." Citizens Comm'n, 45 F.3d at 1328 (quoting Zemansky, 767  
 17 F.2d at 571) (court's emphasis). An agency can meet its burden by submitting an affidavit  
 18 "setting forth the search terms and the type of search performed, and averring that all files likely  
 19 to contain responsive materials . . . were searched." See *Iturralde v. Comptroller of the Currency*,  
 20 315 F.3d 311, 313-14 (D.C. Cir. 2003).

21 Here, defendants were unable to document the search that had been conducted in the past  
 22 because of personnel changes and their failure to document the prior search that had been  
 23 performed. Defendants therefore volunteered to conduct a new search. The Moore Declaration  
 24 explains that the search was reasonably calculated to discover all responsive materials. The  
 25 Moore Declaration also explains that the databases searched would have been likely to contain  
 26 any documents responsive to the requester. Moore Declaration at ¶ 3(a). Moreover, the Moore  
 27 Declaration described an extensive list of search terms used to conduct the search. Moore  
 28

1 Declaration at ¶ 3(b). Hence, since defendants demonstrated that their search was performed in  
 2 good faith, was reasonably calculated to uncover all likely documents, and did not turn up  
 3 additional documents beyond the appendices which were released to plaintiffs, the search was  
 4 proper and the Court should grant defendants' motion for summary judgment.

5 **IV. THE REVISED VAUGHN INDEX SUFFICIENTLY  
 6 DESCRIBES THE SPECIFIC HARMS WHICH MAY  
 RESULT FROM RELEASE OF THE INFORMATION.**

7 The Court found that the Vaughn Index as previously drafted did not adequately describe  
 8 the specific harms which may result from the release of the documents. Order at 8-9.  
 9 A Vaughn Index properly identifies each document withheld, the statutory exemption claimed,  
 10 and provides "a particularized explanation of how disclosure of the particular document would  
 11 damage the interest protected by the claimed exemption." *Weiner v. FBI*, 943 F.2d 972, 976 (9th  
 12 Cir. 1991). The Revised Vaughn Index explains in great detail the specific harm which may  
 13 result from the release of the documents in question.

14 Here, the Revised Vaughn Index clearly explains that avoiding the threat of serious  
 15 injury or death to U.S. forces under fire is one of the main reasons for classification of these  
 16 documents pursuant to Exemption 1. Knowledge of our procedures and tactics, the Rules of  
 17 Engagement and the standard operating procedure at checkpoints, for instance, could allow the  
 18 enemy in Iraq to alter its behavior in conformity with the knowledge gained from this classified  
 19 information, thus placing U.S. forces at risk of death or injury. Revised Vaughn Index at 2-5.

20 For instance, the Revised Vaughn Index explains, with regard to Documents 1, 2a, 2b, 2c,  
 21 2d, 2e, and 3, that if our opponents knew our Rules of Engagement they could alter their  
 22 behavior, which would put our own service members and Coalition Forces at risk as they follow  
 23 the procedures laid out in this document, resulting in the possible loss of lives of our troops.  
 24 Revised Vaughn Index at 2-5. Non-disclosure, therefore, safeguards information that could be  
 25 exploited by our enemies. Since the Revised Vaughn Index properly explains the potential harm  
 26 that may result from release of the documents in question, summary judgment in favor of  
 27 defendants is appropriate. Revised Vaughn Index at 1-5.

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1       Documents 3b, 3c, and 3d were properly classified because they concern rules of  
2 engagement, targeting information, and weapons systems or operations. This information could  
3 be used by the enemy to “circumvent lawful actions by Coalition forces.” Again, this would  
4 enable the enemy to “alter [its] behavior, which would put our own service members and  
5 Coalition Forces at risk.” Revised Vaughn Index at 5-6. Similar concerns are addressed with  
6 regard to document 4. Revised Vaughn Index at 7-8.

7       With regard to the 15-6 report (document 5) and its annexes, the Revised Vaughn Index  
8 makes clear that information contained within the 15-6 report and the annexes such as, but not  
9 limited to, rules of engagement, standard operating procedures, operational routes, roadside  
10 security and other essential military operations, traffic control points, blocking positions,  
11 information concerning improvised explosive device threats and detection, are all properly  
12 classified as secret pursuant to E.O. 12958, as amended, Sec. 1.4(a), which concerns military  
13 plans, weapons systems, or operations. The Revised Vaughn Index also makes clear that  
14 unauthorized disclosure of this information could reasonably be expected to result in damage to  
15 national security. Revised Vaughn Index at 9. In addition, this and similar information was also  
16 properly classified as secret pursuant to E.O. 12958, as amended, Sec. 1.4(g) which concerns  
17 vulnerabilities or capabilities of various systems, installations, projects and plans. Revised  
18 Vaughn Index at 9. For a full description of the other harms tied to release of the 15-6 report, the  
19 Court is respectfully referred to the Revised Vaughn Index at 9-10, pertaining to Exemptions 2,  
20 3, 5 and 6. Since the Revised Vaughn Index fully describes the harms likely to result from the  
21 release of the documents in question, defendants are entitled to summary judgment.

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## **CONCLUSION**

For the foregoing reasons, the Court should grant defendants' renewed motion for  
ary judgment.

4

5 Dated: December 14, 2007

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 14, 2007, a true and correct copy of the foregoing Defendants' renewed motion for summary judgment was served via ECF upon plaintiffs' counsel of record at the address listed below:

5           Chris Ford, Esq.  
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Dated: December 14, 2007.

s/ William B. Jaffe  
**WILLIAM B. JAFFE**

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